

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of N.B. and the)
MSD of Martinsville) **Article 7 Hearing No. 921-96**
)

The Student, through his parent and his attorney, raised nineteen issues before the Independent Hearing Officer (IHO).¹ These issues mainly concerned whether the individualized education program (IEP) developed for the Student in August, 1996, was appropriate; whether the IEP was in compliance with a previous IHO's decision; and, whether the IEP was being appropriately implemented. The only issue raised on appeal concerned the appropriateness of the Student's IEP, specifically as it pertains to placement.

PROCEDURAL HISTORY OF THE DUE PROCESS HEARING

It should be noted from the outset that any reference to the "Student" or the "Student's attorney" includes the parent of the Student.

September 13, 1996 The parent requested a hearing for the Student, alleging the School refuses to obtain an appropriate assistive technology evaluation and the placement and related services as identified in the IEP are not being implemented as written.

September 19, 1996 Dennis Graft, Esq., was appointed IHO under 511 IAC 7-15-5.

September 25, 1996 School requested a thirty (30) day extension of time for the hearing. The IHO granted the extension of time, with the decision to be rendered by December 12, 1996.

November 7, 1996 A prehearing conference was conducted at the administrative offices of the School. The following issues, as identified in the IHO's November 11, 1996 Prehearing Conference Order, were established:
1. Is the Student's 8/13/96 IEP appropriate and in compliance with the prior hearing officer's order of 7/24/95?

¹One issue, number 6, was withdrawn by the Student's attorney at the start of the hearing, leaving eighteen issues for the IHO to determine.

2. Should the Student receive special education consultation or special education resource services as defined by 511 IAC 7-14-2 and 511 IAC 7-14-3, or full time special education services as defined by 511 IAC 7-14-5?
3. Should the Student be receiving LD services for language and science?
4. What is the modified grading scale to be applied to the Student?
5. What is "lunch with supervision" and does it include lunch alone with a teacher?
6. Is the Student in need of wrap around services from DOE?
7. What is meant by "go-to" person and what was intended?
8. What is intended by the term "computer availability?"
9. What is to be done in the resource room and with whom?
10. Are the objectives appropriate and sufficiently detailed?
11. Is it appropriate to include in the Student's IEP that the "LD/EH teacher will remove Student from general education class to self-contained LD/EH?"
12. Should [the Student's current special education teacher] continue to be involved in the Student's educational program?
13. Should the Student be placed in a one-on-one situation for math and English, and specifically what English class?
14. Has the Student been given school work he missed?
15. What is appropriate "time out" for the student?
16. Has the school followed suspension procedures?
17. Is the Student in need of additional accommodations or adaptations?

To accommodate the parent, the IHO included in his order that the parent shall be entitled to record the hearing; to have an advocate present to assist her during the hearing, which advocate may testify at the hearing; and the parent may request periodic breaks. The hearing was scheduled for November 27, 1996.

In response to the Student's attorney's request for an interim order on placement pending the hearing, the IHO ordered that the School was to provide the parent with a pager; the Student was to be placed in regular math and English classes unless, through a case conference committee the parties agreed to a change of placement, and the Student was to take lunch with other students supervised by school personnel; the Student be allowed to ask for and be given time outs in an area separate from other students; and that the Student's current teacher of record was to remain the Student's teacher of record and provide services in the general classroom, but not one on one in a self-contained classroom.

November 21, 1996 The School, by counsel, requested a continuance of the hearing. Over the

objection of the Student, the IHO granted a continuance such that the decision was to be rendered by January 11, 1997.

November 27, 1996 The Student, by counsel, requested a continuance of the hearing and also a clarification of the interim orders and the addition of two issues. The request for an extension of time was granted. The hearing was subsequently scheduled for January 8 and 9, 1997.

November 29, 1996 The IHO issued a clarification of the interim orders, indicating that the Student could be disciplined and suspended as other students, so long as such suspension was temporary and did not exceed ten days.

December 3, 1996 Two additional issues were added:
(A) Whether the school has appropriately suspended the Student.
(B) What is the appropriate behavior modification/discipline plan for the Student?

The due process hearing was conducted over four days--January 8 and 9, 1997 and February 4 and 5, 1997.² At the start of the hearing, the School moved for separation of witnesses, which was granted, and also moved to dismiss³ the request for the hearing, which was denied. At the conclusion of the second day of the hearing, the Student orally requested interim orders pending the completion of the presentation of evidence and the written decision. After argument of the parties, the IHO entered interim orders to provide for the Student's return to school pending the written decision. Pursuant to the interim orders, the Student was to return to school on January 13, 1997 and serve four days on an in-school suspension in the same room as other students during which time he would be supervised from a distance and provided with home work and after school assistance. The Student's psychologist was to be contacted concerning interventions among the Student, his parent and the Student's teacher. Beginning on January 21, 1997, the Student was to return to his prior program with six periods of general education classes and one period in the resource room. The Student's LD/EH teacher would continue, pending a written report from the Student's psychologist. The Student's "go to" person was changed to a male counselor, and procedures for meeting with the male counselor were outlined. The IHO further specified procedures to follow in the event the Student's behavior is out of control. The interim orders were modified on January 14, 1997 to indicate that the Student's psychologist would not be available as a backup if the School was unable to contact the

²The hearing had originally been scheduled for two days, January 8 and 9, 1997. At the conclusion of the second day of the hearing, the parties agreed to schedule two more days of hearing on February 4 and 5, 1997, thereby extending the time for issuing a written decision to February 20, 1997.

³The Motion to Dismiss was renewed later during the course of the hearing. This motion was also denied by the IHO.

parent, and to indicate that the Student's classroom assignments for integrated algebra and tech prep English would be changed.

The IHO's written decision was issued on February 18, 1997. The IHO's decision found the Student is a fifteen (15) year old male who is a freshman in high school. He has been determined to have a learning disability and an emotional disability. The Student and the School have had a number of past disputes, including complaints and hearings. A previous hearing officer entered a written decision on July 24, 1995. In response to this order, a case conference committee convened on August 17, 1995 and developed an IEP which included an adaptation checklist. The parent agreed to the case conference committee's recommendation. In compliance with the July 24, 1995 decision, the Student, for the 1995-1996 school year, was transferred to a different middle school for his 8th grade year, with the school hiring a teacher dually licensed to teach the learning disabled and emotionally handicapped, solely to teach the Student one on one. The Student initially received instruction one on one, but pursuant to the Behavior Management Plan (as outlined in the previous decision), the Student could be placed in general education classes, depending upon his behavior. By November, 1995, the Student was in general education classes for science, social studies, art and choir, with his special education teacher in each class. Through a case conference committee, the Student's IEP was modified to provide a modified grading scale, monitor the Student's frustration, make modifications and confer with the Parent every two weeks. "Time out," as ordered in the previous hearing was modified such that it was to be given at the Student's request or when the Student was misbehaving. If the Student were to leave school, he would not be physically restrained by School staff, but the parent would be called and, if the parent was unavailable, the police would be called. By February, 1996, English was added as a general education class for the Student. The IEP was further modified to provide the Student with a tape recorder for taping lectures. The assistive technology evaluation had also been completed.

On May 29, 1996, a case conference committee was held to review the Student's 8th grade program and develop his 1996-1997 IEP and ITP. Although there were behavioral problems with the Student (he had received four and one-half days of suspension), the eighth grade year was generally successful. The Student would be transferring from a middle school with approximately 650 students to a high school with approximately 1650 students. It was noted the Student had limited social skills and would need a "go to" person to provide support. The IEP developed was similar to the IEP as modified for the 1995-1996 school year. Additional modifications were that oral dictation technology was to be made available to the Student to complete assignments, lunch with supervision, and a modified grading scale. The parent did not agree with this IEP.

On August 13, 1996, another case conference committee meeting was held to develop the Student's IEP for the 1996-1997 school year. The committee's recommendation was generally the same as the past 3 or 4 case conference recommendations, i.e., full time EH/LD placement and to follow the prior hearing officer's behavioral plan. The Student would be offered courses

in general education classes depending upon his performance under the behavior management plan. Modifications included the use of oral dictation software, a modified grading scale, adaptation checklist, assignments to be completed in school and the Student was allowed to have a second set of textbooks at home. The Student's "go to" person was identified as a female counselor who usually counsels special education students. During the resource period, the Student would have available a computer and a teacher to assist with academics. The LD/EH teacher could remove the Student from general education to a self contained classroom. The parent did not agree with the recommendations of the committee.

The Student began the 1996-1997 school year integrated into all of his general education classes due to the fact this was the status at the end of his 8th grade year. A case conference committee meeting was held on October 9, 1996 to clarify the IEP and to address the Student's behavior problems which included cursing and derogatory comments and actions directed at his teachers in the presence of other students; and insubordination, oppositional and disruptive behavior; not completing assignments, demanding attention, bothering other students, walking around the classroom, not asking for time outs and leaving class without prior approval. The IEP was clarified to provide: for the behavior management plan, clarification to indicate responsibility for obtaining points and signature of teachers and reporting the information to the parent; weekly grade updates including notification of incomplete or partially completed assignments, test and quiz grades and copies of assignments to be sent home; all assignments and work were to be available at the bi-weekly scheduled parent/teacher conferences; and the Student would have day-for-day time to make up missed work. The parent agreed to these clarifications, but maintained her objections to the IEP.

During the first semester of the 1996-1997 school year the Student received various disciplines for his behavior, including out of school suspensions, in school suspension and detentions. "Lunch with supervision" was provided by the LD/EH teacher and the regular lunch room monitoring teachers through observation. Due to an incident on October 15, 1996, the Student was removed from the regular lunch room to a separate room with his one on one teacher through November 11, 1996, when this IHO issued an interim order placing him back into the regular lunch room. The Student's behavior was inappropriate and he received a one day suspension.

During the eighth grade and during the 1996-1997 school year, the school staff believed that if for a period of three weeks the Student's behavior points were below 60% they could remove him from a general education class on their own, since the parent refused to meet with them. Such removals were viewed as temporary.

In October, 1995, an incident occurred in which the special education teacher grabbed the Student's arm, allegedly causing bruises. However, during the balance of the 1995-1996 school year the Student and special education teacher appeared to get along well. During the 1996-1997 school year the relationship deteriorated. The Student does not like the teacher and believes she intentionally antagonized him.

Prior to the start of the 1995-1996 and 1996-1997 school years, the special education teacher met with the Student's general education teachers and reviewed the Student's IEPs. While in the general education classes, the special education teacher would be present, initially for the entire class and later less, if the Student's behavior was appropriate. The special education teacher also provided assistance to other students in the class so that attention was not drawn to the Student and his "own teacher." When the Student was not in school, the special education teacher obtained the assignments and notified the Student.

During the fall of 1996, the local city police were called to the high school on several occasions in response to the Student's behavior. On one occasion the Student was handcuffed and taken to the police station. A friend of the Student's parent picked the Student up at the police station due to the parent's unavailability.

The Student has a problem with the principal, whom the Student perceives as coming on too strong and trying to antagonize the Student. The Student has problems with his "go to" person and has used foul language and been disrespectful to this person. Since the latter part of the first semester of the 1995-1996 school year, the parent has not attended the prior ordered bi-weekly meetings with the special education teacher.

The Student did not attend school from the later part of November, 1996 through January 13, 1997, when he returned pursuant to the IHO's interim order. The Student did not attend school during this time due to his fear of again being removed from school by the police. The Student has not been physically aggressive toward other students, but his verbal comments make him a possible target for physical attacks, which have occurred on a few occasions.

The Student's present social/emotional levels, and what stimulates him to act out and how he perceives information are unknown. A functional assessment is necessary, with the Student, his parent, special education teacher and "go to" person participating. This assessment should also address the Student's belief that he can do regular algebra and English.

Based upon the above-referenced Findings of Fact, the IHO concluded that the Student's 1996-1997 IEP of 8/13/96, as modified, is appropriate and is in compliance with the prior IHO's decision of 7/24/95. The Student should receive full time special education services as defined by 511 IAC 7-14-5 and should be receiving LD services for language and science. The modified grading scale to be used for the Student is that which is specified in the 8/13/96 IEP. "Lunch with supervision" means that the Student shall be supervised by his teacher or other lunch room monitoring teachers such that the teachers may watch the Student. Supervision will increase or decrease depending upon the Student's behavior. Should the Student's behavior warrant removal to a one on one lunch with a teacher, the removal will not be permanent, with the Student to return to the regular lunch room within a few days considering the cause for removal and the Student's behavior in the one on one lunch setting.

The designated "go to" person is a person the Student may speak to about his problems

and who will work with the Student to calm him down when agitated. The Student is to obtain permission to go to this person, but permission shall not be unreasonably withheld. The “go to” person shall be the male counselor as specified in the interim order.

The Student is not proficient in keyboarding and lacks fine motor control for such activities. The dictation software is not conducive to use in the general classroom. “Computer availability” means that the Student shall have available to him in the resource room an adequate computer and software, including the dictation program. In the resource room the Student shall receive assistance in his academic classes by the previously designated LD/EH teacher.

The objectives in the Student’s current IEP are appropriate and sufficiently detailed. The Student’s current dually certified LD/EH teacher shall remain involved in the Student’s educational program. The teacher, parent and Student shall continue to meet with the Student’s psychologist in an effort to mend past problems. The Student should not presently be placed in a one on one situation for math and English.

The Student has been given the school work he has missed and the school shall continue to provide to the Student a list of missed work and shall send home to the parent, at least every week, a list of missed work. The appropriate “time out” for the Student is that specified in the prior hearing officer’s decision as modified on the 11/2/95 IEP, but there is no reason for the Student to leave the school building unless given prior approval. The School has followed the suspension procedures under Indiana law, and during the 1996-1997 school year the Student has not been disciplined such that there has been a change in his placement. Suspensions have been appropriate and consistent with the Student’s IEP.

The School has provided reasonable accommodations and adaptations, including modified assignments, no home work, modified grading scale, dictation software for the computer in the resource room and text books for home use.

The appropriate behavior management plan for the Student is the plan ordered by the prior hearing officer in his decision of 7/24/95 plus the procedures outlined in Conclusion of Law No. 13.⁴ The special education teacher, rather than the Student, shall obtain the points from the teachers on a daily basis. Police intervention will be a last resort for the most egregious behavior. The procedure for misbehavior shall be that the Student first meets with the “go to” person. If misbehavior continues, the parent shall be paged. The parent shall immediately proceed to the high school, and if the Student remains out of control, the parent shall remove the Student from school grounds and proceed to the Student’s psychologist’s office so that the Student can meet with him if he is available. If the parent does not respond within thirty minutes and the Student continues to be uncontrollable by school personnel, the Student shall be directed

⁴Conclusion of Law No. 13 provides that the appropriate “time out” for the Student is that specified in the prior hearing officer’s decision of 7/24/95 as modified on the 11/2/95 IEP, but there is no reason for the Student to leave the school building unless given prior approval.

to Room 122 for additional “time out.” The friend of the parent, previously designated, shall be called to pick up the Student. If she is not available and the Student remains out of control, the parent’s attorney shall be called for input and guidance. As a last resort, the Student may be removed by the local police.

Should the Student obtain behavior scores below 60% for three consecutive weeks, the parent and special education teacher shall meet immediately upon the teacher's request. Should the parent fail to meet the teacher within a reasonable time, the Student shall be placed in a one on one setting with the special education teacher on a temporary basis. If the Student's behavior is rated 80% or higher for the next 10 days, the Student shall return to the general education classes.

Based upon the foregoing findings of fact and conclusions of law, the IHO issued the following orders:

1. The Student shall continue to be placed in his present general education classes, subject to his behavior, pursuant to the prior hearing officer's behavior management plan, as modified by the Conclusions stated herein.

2. The Student's parent, his dually certified LD/EH teacher, and the "go to" person shall meet bi-weekly to discuss problems and successes in an endeavor for the Student to remain in the regular educational classes. Should the parent fail to appear, the Student's attorney shall be notified and attend on behalf of the parent. Should neither the parent nor the attorney attend, or there are not other suitable arrangements made, the School should seek the appointment of a surrogate parent.

3. The Student, his parent and his dually certified LD/EH teacher shall continue meeting with the Student's psychologist to work out communication and other problems. The School shall bear the cost of such meetings or sessions.

4. The School shall continue to provide a beeper, free of charge, to the mother and the same shall be tested at least once each month to insure that the beeper is working properly.

5. The Student shall have a functional assessment by a qualified psychologist, with the Student's parent, the dually certified LD/EH teacher, and the "go to" person to cooperate in this assessment.

This psychologist shall monitor the Student's education program and behavior for the balance of the 1996-1997 school year (and for summer school, 1997, if necessary) and submit his written report and participate in the Student's case conference for preparation of the Student's IEP for the 1997-1998 school year.

6. The Student's discipline shall be handled by the assistant principal currently in charge of discipline, not the principal, due to apparent past problems between the principal and the student, in an effort to provide the Student with a fresh start.

7. The Student's "go to" person shall be the male counselor heretofore ordered in this hearing officer's interim order of January 10, 1997.

8. The dually certified LD/EH teacher shall, at a minimum, be present at the start and end of each of the Student's regular class periods. This teacher should not "fade away" but be present to observe and assist the Student.

9. The dually certified LD/EH teacher, the Student's "go to" person, his regular education teachers, and the assistant principal shall meet bi-weekly to discuss successes, problems, and observations of the Student, to continually try to modify and adapt so that the Student may achieve success.

The IHO advised the parties of their right to appeal and the timelines for doing so.

PROCEDURAL HISTORY OF THE APPEAL

Although the IHO's written decision was issued on February 18, 1997, the School requested on March 18, 1997, an extension of time to prepare a Petition for Review. The Indiana Board of Special Education Appeals (BSEA) on March 19, 1997, granted the request, permitting the School to prepare and file a Petition for Review by the close of business on April 21, 1997. The School's Petition for Review was received on April 21, 1997. On April 23, 1997, the parent filed a Motion for Extension of Time to respond to the School's petition. By order dated April 23, 1997, the BSEA granted the request for an extension of time, permitting the parent to prepare and file a Response to the Petition for Review by the close of business on May 21, 1997 and also extended until June 30, 1997, the time within which it must conduct review and issue a written decision.

The parent did not file a Response to the School's Petition for Review, but on May 20, 1997, the parent filed a Motion to Dismiss, alleging that this matter was moot as the parent and Student have moved from the state of Indiana and do not intend to return to Indiana or to the School district. The School did not file a written response to the Motion to Dismiss, but counsel for the School advised the General Counsel for the Indiana Department of Education that the School would prefer the BSEA to decide the appeal in the event that the Student returned to the School district.

On June 4, 1997, the BSEA denied the Motion to Dismiss and notified the parties that it would conduct its review on June 25, 1997, beginning at 1:30 p., but without oral argument and without the presence of the parties. 511 IAC 7-15-6(k). However, the BSEA notified the parties that the review would be tape recorded and a transcript prepared. A copy of the transcript will be sent to the representatives of the parties when available.

School's Petition for Review

The School's Petition for Review was timely filed on April 21, 1997. The School took exception to the IHO's Conclusion of Law No. 1 and Order No. 1. In Conclusion of Law No. 1 the IHO determined that the Student's 1996-1997 IEP of 8/13/96, as modified, is appropriate and is in compliance with the prior hearing officer's decision of 7/24/95. Order No. 1 provides that the Student shall continue to be placed in his present general education classes, subject to his behavior, pursuant to the prior hearing officer's behavior management plan, as modified by the Conclusions stated in the IHO's decision. The School's position in its Petition for Review is that the Student's IEP of 8/13/96 is in compliance with the prior hearing officer's decision and that, at the time it was written, it was appropriate. The School claims that subsequent events, and the behavior of the Student, have rendered that IEP no longer appropriate and that an appropriate placement for the Student, as of the time of the hearing, would be either a diagnostic or a residential placement. In rendering this conclusion and order, the School maintains the IHO was

arbitrary and capricious, and ignored evidence, case law and statutory authority. The School believes the Student is a danger to himself and others and that due to his behaviors and chronic absences, a residential or diagnostic placement is necessary for the Student to receive educational benefit. In support of its argument, the School presented a lengthy recitation of the past history with this Student and indicated that the Student had been successful in school during the periods of time when he had been outside of the home, either in a hospital setting or in foster care.

REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on June 25, 1997, to conduct its review of the above-referenced matter. All members were present and had reviewed the record and the Petition for Review. The Indiana Board of Special Education Appeals now finds as follows:

Combined Findings of Fact and Conclusions of Law

1. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-15-6.
2. No objections were raised to any of the IHO's thirty-eight (38) Findings of Fact. The IHO's Findings of Fact are upheld.
3. The IHO's seventeen (17) Conclusions of Law are based upon testimony presented and documentary evidence submitted. The record and Findings of Fact amply support the IHO's Conclusion of Law No. 1 that "[t]he Student's 1996-1997 IEP of 8/13/96, as modified, is appropriate and is in compliance with the prior hearing officer's decision of 7/24/95."
4. The IHO's Order No. 1, which provides that "[t]he Student shall continue to be placed in his present general education classes, subject to his behavior, pursuant to the prior hearing officer's behavior management plan, as modified by the Conclusions stated herein[,] is an appropriate order based upon the Findings of Fact and the Conclusions of Law, as determined by the IHO, and is not contrary to law.

All voted by the BSEA regarding the above were voice votes and were unanimous.

Orders of the Indiana Board of Special Education Appeals

In consideration of the above Combined Findings of Fact and Conclusions of Law, the Indiana Board of Special Education Appeals now holds:

1. The decision of the IHO is upheld in all respects.
2. All other Motions not specifically addressed herein are hereby deemed denied.

Date: June 26, 1997

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

Appeal Right

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).